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of the vacation order, plaintiff sued out a writ of error. Held, that if the vacation order was final, the writ of error was too late, and, if not final, then neither was the order denying the motion to set it aside, and was therefore insufficient to sustain the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 329-331, 335-343, 1889-1893, 1896; Dec. Dig. §§ 66, 344.* 12 Va.-W. Va. Enc. Dig. 125.]

Error to Circuit Court, Scott County.

Action by one Brown against the Carolina, Clinchfield & Ohio Railway Company. A judgment was rendered dismissing the suit, and plaintiff brings error. On motion to dismiss. Granted.

John Kee and *Russell S. Ritz*, both of Bluefield, W. Va., for plaintiff in error.

S. H. Bond, of Gate City, and *Walter H. Robertson*, of Johnson City, Tenn., for defendant in error.

MATNEY et ux. v. BARNES et al.

Sept. 7, 1914.

[82 S. E. 801.]

1. Specific Performance (§ 97*)—Contract or the Sale of Land—Bill.—Where a bill for specific performance of a contract for the sale of land at a specified price per acre alleged that the price was to be paid when the land was surveyed under the direction of a competent engineer at the expense of the purchaser, the sellers to furnish an abstract and tender a deed, but that they refused to permit the land to be surveyed, declined to furnish the abstract of title, and refused to execute and deliver a deed, and that complainants had carried out all the terms and conditions of the contract on their part save such as they were prevented from performing by defendants, and were ready, able, and anxious to perform, the bill was not demurrable because no offer nor tender had been made by complainants to comply with their part of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.* 12 Va.-W. Va. Enc. Dig. 645.]

2. Specific Performance (§ 97*)—Conditions Precedent—Tender of Purchase Price.—Where a contract for the sale of land at a specified price per acre provided that the land should be surveyed to ascertain the amount due, but the vendors refused to permit a survey, the purchasers were thereby excused from tendering the purchase price as a condition precedent to the right to sue for specific performance.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

[Ed. Note.—For other cases, See Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.* 12 Va.-W. Va. Enc. Dig. 645.]

3. Equity (§ 377*)—Issue Out of Chancery—Conflicting Evidence.—In a suit for specific performance, defendants were not entitled to have an issue, as to whether they executed the contract sought to be enforced, passed on by a jury on an issue out of chancery because the evidence was conflicting, since such question depends solely on whether the chancellor needs the aid of a jury to enable him to decide the case satisfactorily to his own conscience.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 788-793; Dec. Dig. § 377.* 8 Va.-W. Va. Enc. Dig. 47, 50.]

4. Judges (§ 28*)—Vacation Case—Trial of Equity Suit.—A suit in equity was properly tried as a vacation case, where it appeared that it was more speedily disposed of in that way than could have been had it been continued to the next term after the vacation order was made.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 109-139; Dec. Dig. § 28.* 2 Va.-W. Va. Enc. Dig. 768.]

5. Specific Performance (§ 65*)—Remedy—Right to Relief.—Where defendants, who could both read and write, executed a contract for the sale of their land freely without the slightest compulsion and the contract was clear, simple, certain, definite, fair, equal, and founded upon a valuable consideration, complainants were entitled to enforce specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 196; Dec. Dig. § 65.* 12 Va.-W. Va. Enc. Dig. 485, 491, 496, 499, 505, 513.]

Appeal from Circuit Court, Buchanan County.

Bill by A. W. Barnes and another against John Matney and wife for specific performance of a contract for the sale of land. Decree for complainants, and defendants appeal. Affirmed.

Chase & Daugherty, of Grundy, and *Sutherland & A. A. Skeen*, all of Clintwood, for appellants.

George W. St. Clair, of Tazewell, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.